Constitution-Building in Political Settlement Processes

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1. Introduction

This workshop was organized and hosted by the Constitution-Building Processes Programme of the International Institution for Democracy and Electoral Assistance (International IDEA), the Edinburgh Centre for Constitutional Law and the Global Justice Academy, in association with the Political Settlements Research Programme at the University of Edinburgh. It explored the first stage of the transition from violence to politics, which potentially includes a sequence of political agreements from a peace deal to a (new) constitutional arrangement.

This was the second event in a series of annual workshops known as the Edinburgh Dialogues on Post-Conflict Constitution-Building. The inaugural workshop on 'Interim Constitutions in Post-Conflict Settings' addressed the role of interim constitutions as peacebuilding and democracy-building tools, and considered those who negotiate and draft these constitutions and how these documents differ from peace agreements and final constitutions (Davies et al. 2015). International IDEA presented the findings of the inaugural workshop in a Policy Paper (Zulueta-Fülscher 2015).

The second workshop built on comparative knowledge and understanding of the constitution-building process as part of the broader political settlement process during or after conflict. The political settlement process is generally understood as 'the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power' (Di John and Putzel 2009: 4). The workshop also examined how political settlements emerge and which actors and processes shape these settlements, and explored the relationship between peace agreements and constitutions during the broader political settlement process. In addressing these questions, workshop participants were asked to: define political settlements, assess the role of elite bargains (and who is included and excluded), evaluate the types of guarantees that should ensure implementation of the agreements, consider the most effective timing and sequencing of events to reconfigure the political settlement, and identify which factors are crucial to peace sustainability.

In practice, peace agreements and constitutions are connected, although not in a linear or symmetrical way. Often the purpose of a peace agreement and/or (new) constitutional arrangement is to reach a new political settlement and document the commitments to it. Peace agreements often come before constitutions in the overall political settlement process, and sometimes constrain or determine the options for constitutional design; the constitution then becomes an additional instrument that enables sustainable peace. Given the link between these two documents, they often merge in the broader political settlement process into 'constitutional peace agreements' or 'peace agreement constitutions'. Yet the commitment to a revised political settlement may be very thin or non-existent, in which case both the peace agreement and any

follow-up constitutional framework bear the heavy burden of trying to forge a new settlement capable of delivering peace. However, the academic and policy literatures on conflict resolution and constitution-building often address peace agreements and constitution-building as separate issues and processes.

The methodological approach adopted for this workshop was a qualitative comparative framework using relevant case studies. The case studies helped participants assess and contextualize the impact of the political settlement process on the inclusiveness of the final constitution-building process, and potential lessons learned. The participants in the workshop are listed in Annex 1. The discussions were held under the Chatham House Rule.[1]

The workshop comprised five sessions in which participants addressed a set of questions concerning the political settlements in the five case study countries—Libya, Somalia, Yemen, Zimbabwe and Kenya. The participants also drew on their knowledge of other cases, including South Africa and Northern Ireland.

The first session established the conceptual framework defining political settlements and addressed the emerging practice and theory of political settlements and the relationship between peace agreements and constitutions within the broader political settlement process. It also reflected on the dynamics of bargaining and the role of inclusion throughout the process. It used the case studies of Kenya and Zimbabwe to examine the dynamics of constitutional negotiations, and the concepts of inclusion, participation and representation as they relate to the political settlement process.

The second session addressed the issue of inclusion in the political settlement process in the context of Somalia, Libya and Yemen. It also explored the implications for inclusiveness and the differences between peace agreements that include constitutional provisions, and constitutions that serve as peace agreements, in terms of their production and relative inclusiveness.

The third session addressed the issue of elite bargains and pacts—from the initial peace agreement to the constitution-making process—and the extent to which they may limit public participation, especially in constitution-building processes. It also addressed whether elites truly represent their constituents or include their inputs in the constitutional process. This session assessed the case studies of Somalia and Zimbabwe.

The fourth session turned to public participation to understand how inclusion can affect the constitution-making process and political settlement. It examined guarantees for implementation that elites might put in place while designing transitional arrangements (that is, the 'peace agreement' constitution or 'constitutional' peace agreement), and the extent to which these guarantees can hamper flexibility in the constitutional negotiation process. The case studies considered were Somalia and Kenya.

The fifth session addressed the role of the international community, in its various guises, in the political settlement process and how that role can affect inclusion throughout the

[1] 'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed'. For further information, see <https://www.chathamhouse.org/about/chatham-house-rule#sthash.7L9RA5h8.dpuf>

process. The concluding session reflected on the previous discussions and identified lessons learned and consensus from across the case study countries.

This report summarizes the workshop discussions, highlighting the normative and practical questions raised and the concluding thoughts of the participants. It serves as a starting point for a set of policy recommendations that may be further developed in a separate Policy Paper.

2. Definition

A commonly used definition of a political settlement is from Jonathan Di John and James Putzel: 'the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power' (2009: 4). This definition accepts that such settlements are 'usually forged between elites' (Whaites 2008: 4; Di John and Putzel 2009; DFID 2010: 22), but that participation and inclusion in political settlements are important for their success (Fritz and Menocal 2007; Castillejo 2014; see also Laws 2012). A political settlement is furthermore understood as both an objective and a process. As a process, it might be equated to both the peace and constitution-building processes, as a new political settlement is necessary when negotiated either a peace agreement or a (new) constitutional arrangement.

The concept of a political settlement has developed in response to a sense of disillusionment across academia and in practice, with the study of transitions from conflict and authoritarian rule to peace and democracy. There is an emerging consensus that there has been a failure to understand the complexity of the politics of peacebuilding, regarding both the formal and informal processes through which elites negotiate and come to agreements. International actors often misunderstand the forces and mechanisms driving the decisions of local actors, and vice versa. More attention is needed in order to understand how the same tensions that fuel the conflict are often built into the peace agreement framework and play out in the constitution-building process.

The constitution is meant to solidify the political settlement in its most principled form. In stable states, constitutions reflect political consensus and are closely related to the underlying political settlement, which they document and translate into the country's political and legal institutions. Yet in unstable settings, constitutions must often play a more developmental role in terms of building consensus, as a form of conflict-resolution mechanism. However, it is not clear whether constitutions can bear the burden of creating such a consensus, or whether they can survive with only a thin consensus as a minimum common denominator. In particular, where power-sharing arrangements—political, territorial or military—are included, the political tensions of the conflict will often be built into the fabric of the constitution in ways that external experts are often not aware of. Constitutions are always reflective of political deals, but can ideally also transform local realities. This report will consider how these documents are constructed throughout the political settlement process, addressing both principled and pragmatic questions in the attempt to end conflict.

The constitution-building process itself reflects a key tension present throughout the broader political settlement process: do post-conflict constitutions simply reflect the

elite power map, ossifying the relative strengths of each party to the political deal? Or can they transform a divided society in conflict into a united political community at peace? This question also affects how constitutions are viewed, in particular by the international community. Are they the *starting point* for a broad transformation of the political–societal order that, through the design of its political institutions and mechanisms, is capable of effecting real changes in attitudes and behaviours? Or are they better seen as the *outcome* of an underlying wave of political processes and dynamics, which results in a new *grundnorm* (basic law) upon which the constitution can be built?

3. Themes

Three key themes emerged from the five sessions: timing, participation and the role of the international community. While these themes overlap, each will be considered separately in this report, which references the case studies where relevant.

Timing and sequencing in the political settlement process

A key issue that emerged in the discussion was the question of timing, which included questions of imposed deadlines throughout the political settlement process and the sequencing of specific events in the political settlement process—for example, a peace agreement followed by an interim constitution and then a final constitution.

Regarding deadlines, the discussions highlighted a common challenge in the post-conflict contexts studied as to whether to capitalize on the momentum for change and draft a constitution quickly (while fragile political consensus and alliances hold), or whether to proceed more incrementally to build a broad, stable and inclusive consensus upon which an enduring constitutional order can be built. This debate was left unresolved; most participants acknowledged the positives and negatives on both sides. As was argued with the case of South Africa, the required balance between speedy progress and incremental consensus- and trust-building was found in the phased process of negotiations necessary to draft the constitution, which was embodied in the roundtable CODESA agreements and the 34 constitutional principles included in the interim constitution, which guided the final constitution-making process.

The question of timing also captures the complicated relationship between the peace and the constitution-making processes. This issue is explored in the case studies of Yemen (see Box 1), Somalia (see Box 2) and Libya (see Box 3). Conflict is dynamic and changing, and if not addressed at once it can mutate, as was the case in Yemen and Libya. In those cases, the constitution-building process was tailored to accommodate the interests and parties to the initial societal conflict. However, as that conflict mutated on the ground, the design of the constitution-building process became less capable of addressing the needs and demands of the conflicting parties.

Box 1: Yemen case study

The Agreement on the Implementation Mechanism for the Transition Process in Yemen (or Yemen's interim constitution) was signed on 21 November 2011, and was followed by the resignation of President Ali Abdullah Saleh. This agreement, backed by the UN and Gulf Cooperation Council, ended the conflict that had broken out in January 2011 following protests as part of the region-wide Arab Spring movement. The second phase of the agreement included the establishment of the National Dialogue Conference (NDC), which included 565 participants, equally divided between the South and North, which took nine months to report (three months longer than the original deadline), and issued 1,800 recommendations. While the NDC was more representative than most other political bodies in Yemen, it was also perceived by large parts of the population as an elite-driven process that did not address the issues important to ordinary people.

The NDC was unable to reach consensus on all issues. The government pre-empted the constitution-making procedure with the establishment of a Regions Committee, which decided to establish a federal system with six regions, to which for instance the Houthis—a group of Zaidi Shia rebels from the north—and the Southerners would, for different reasons, not agree.

In March 2014, the government established a 17-member Constitution Drafting Committee (CDC). During the drafting process, and especially right after the draft was finished, the conflict between the Houthi and the government in Sana'a significantly worsened: the Houthi staged a coup on 6 February 2015. It is disputed whether this conflict was a consequence of pre-constitutional problems, notably the federal division of the country, or a result of policy decisions made by President Abdu Rabbu Mansour Hadi's government, which replaced the Saleh government in February 2012.

As a consequence of the renewed conflict, the CDC became more than a technical committee. While the CDC was not mandated to resolve the conflict, and did not directly address the concerns of the parties to the conflict, everything it did was reported to the actors in the conflict. However, both the constitution-drafting and peace processes, while happening simultaneously, were artificially preserved as separate.

Workshop participants suggested that the NDC should have been transformed into a parliament to shorten the overall timeline, and that the NDC and CDC could have been compressed into a single process. However, overall the case study highlights the difficulties that arise when the constitution-making process is overtaken by a new and different conflict that challenges the political settlement and generates a new alternative political bargaining process.

Box 2: Somalia case study

After a decade of conflict, the Djibouti-backed Somali National Peace Conference, which met from 2 May to 26 August 2000, represented an important breakthrough in peacebuilding in Somalia. The conference adopted the Transitional National Charter, which established a Transitional National Government and a Transitional National Parliament.

In 2002, Kenya hosted the Somalia National Reconciliation Conference. The participating parties signed the Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process (Eldoret Declaration) in October 2002. In August 2004, a Transitional Federal Parliament was inaugurated, replacing the Transitional National Parliament. This new parliament adopted the Transitional Federal Charter as an interim constitution, which was replaced by a second Provisional Constitution (PC), passed by the National Constituent Assembly in July 2012. The 2012 constitution required political compromise with the Islamic groups that controlled cities, schools, social welfare and medical centres. The result was a constitution with contradictory principles between Islamic and liberal provisions, especially regarding human rights.

Furthermore, the 2012 constitution established that the Federal Republic of Somalia would be composed of two levels of government, the federal government level and the federal member states level, which comprises both regional and local governments. While these member states have to be newly established, the constitution does not specify their boundaries or their powers, which would need to be negotiated between the federal and member-state governments, and approved by the federal parliament; the member states have not yet been formally established.

There is an ongoing process to draft a final constitution, but it is behind the schedule outlined in the PC, which mandates that a public referendum should be held before the end of the Federal Parliament's first term in 2016. Unrealistic deadlines have been supported throughout the process by UN Security Council resolutions. The PC, however, is becoming increasingly compromised as there is a parallel political process—aimed at negotiating regional boundaries—that is not following the constitutional process. Hence in practice, an agreement on regional boundaries will have to be signed before the final constitution can be drafted and adopted.

This example shows that sometimes the use of constitutional iteration is the only option to slowly build a political settlement in a conflict-affected setting. At the same time, it also exemplifies the difficulty of engaging in such a process in this type of setting, and the additional complexity of having to fashion political settlements at the regional level before any countrywide political settlement can be agreed.

In Somalia, the constitution-building process has occurred alongside an ongoing conflict. Unlike many political settlement processes, in which the conflict ends before the constitution-building process begins, and given that the party to the conflict (Al-Shabaab) is not party to the constitutional negotiations, this has had a notable influence on the design of the constitution. Specifically, the constitution has a significant Islamic character, which according to one workshop participant was intended to bring as many constituents inside the 'constitutional tent' as possible. Had the conflict been resolved before the constitution-building process, the constitution may have looked somewhat different. For further information on Somalia, see Box 6.

Box 3: Libya case study

The National Transitional Council (NTC) was formed as an interim rebel administration on 27 February 2011 in Benghazi as protests against President Gaddafi spread across the country. The NTC unilaterally issued a Draft Constitutional Charter for the Transitional Stage ('Constitutional Declaration'), which called for the creation of an elected body, the General National Congress (GNC). The Constitutional Declaration was brief and did not include power arrangements. It was not drafted through an open process; in fact, it is unclear who drafted it. It was a political agreement, and was to an extent imposed by the international community, which needed a framework to work with. The NTC established the Constitutional Drafting Assembly (CDA) in June 2012 to draft a new constitution.

In June 2014 elections were held for the House of Representatives (HoR) to replace the GNC. The election produced a legislature with a very different political makeup than the GNC. This sparked post-election violence in Tripoli that came under the control of rebel (Islamic) groups from the west, which supported the continuation of the GNC. The HoR fled to the eastern city of Tobruk, while the GNC continued to rule in Tripoli. The Supreme Constitutional Court ruled in November 2014 that the election of the HoR was unconstitutional and therefore the elections were invalidated. Both parliaments in Tripoli and Tobruk continued working, the latter disregarding the Constitutional Court's ruling.

The CDA is now functioning amid a civil war between the east and the west of the country. There has been a parallel ongoing attempt to reach another political agreement, brokered by the United Nations. And while attempts to broker a peace agreement have been unsuccessful, the CDA managed to release the latest constitutional draft in February 2016. There have also been calls to return to the pre-revolution 1951 constitution, at least as a baseline for further negotiations.

This example shows the difficulties of bringing about any kind of new and agreed political settlement in a context of general violence and distrust.

Workshop participants noted that in at least three cases (Yemen, Libya, Somalia) significant constitution drafting activity took place outside the country due to security concerns. This pattern suggests that the security situation should be a critical factor when deciding on sequencing—where basic peace is not guaranteed, no constitutional framework will ensure its own implementation. Ongoing conflict also has an obvious impact on the scale of participation that is possible, and general inclusion in the political settlement process.

Participation and inclusion in the political settlement process

The second theme that was revisited throughout the course of the workshop was public participation and representation, which drew together questions on the merits and harm of inclusive processes in relation to the elite-led bargain on which the peace process rests.

During the course of the workshop there was a recurring discussion concerning the definition of 'the public' when speaking about inclusion in the political settlement process. As a corollary to this discussion, there was some debate about the representativeness of those, such as civil society organizations, that claim to act on behalf of the public. Within this discussion a number of points were raised. One such point was that assuming there is the capacity for public participation in the process often presumes there is a functioning state and community, which is not always the case. Where there is ongoing conflict, such as in the cases discussed above, security concerns have implications for participation. Furthermore, 'the public' is often referred to as a single unit, whereas in communally plural and fragmented settings compounded by conflict, it is often very difficult to conceive of the public as a unified whole.

There is also often an assumption that civil society, as a representative of the public, is necessarily good—and that the political class does not truly represent the people. Workshop participants agreed that these assumptions should be questioned. While those involved should not be overly idealistic about civil society, such organizations often deliver public goods or defend the rights of the population, and thus may be perceived as more legitimate than formally elected politicians, who do not necessarily hold legitimacy with the people.

Throughout these debates, questions were raised concerning how beneficial public participation is to the outcome of negotiations in a political settlement process. Participants argued that an inclusive process will likely produce a more ambiguous document as a consequence of a public bargaining process than one that is drafted behind closed doors, where clearer 'yes and no' bargaining can take place. There was also discussion of the idea that public participation should be only be supported at certain stages of the process. Jon Elster's metaphor of the hourglass was used to make the case that the public should be involved at the beginning, but that the discussion needed to be narrowed down to a smaller group of representatives to negotiate a deal before the people could be brought back into process. The constitution-building processes in Zimbabwe (see Box 4) and Kenya (see Box 5) both included public participation campaigns that are considered successful.

This discussion of the legitimacy of civil society tied into another debate on inclusion as participation and representation. This also tied back to questions on timing and when it is best to introduce participation throughout the process, and the implications of different forms of inclusion on the perceived legitimacy and success of the final constitution. For example, the referendum is considered a popular mechanism to increase the inclusion and legitimacy of the constitution-building process. But while in Kenya the process would not have been considered legitimate without a referendum, South Africa and Tunisia are celebrated as participatory, inclusive processes that came to an end without one.

Box 4: Zimbabwe case study

Robert Mugabe has been president of Zimbabwe since its independence in 1980, and the Zimbabwe African National Union—Patriotic Front (ZANU-PF) was the ruling party in parliament until the March 2008 parliamentary and presidential elections. In these elections, the opposition Movement for Democratic Change (MDC)—both factions, the MDC-T and MDC-M—for the first time gained a majority in the House of Representatives, while the ruling ZANU-PF maintained control of the upper house. The presidential election was disputed, requiring a second run-off election between President Robert Mugabe and opposition leader Morgan Tsvangirai (MDC-T) to be held in June 2008. Tsvangirai withdrew from the process, citing violence and fraud.

The African Union (AU) and the Southern African Development Community (SADC) facilitated an agreement between ZANU-PF, MDC-M and MDC-T. ZANU-PF held control over the government, which strengthened their bargaining position, while the MDC-T had command of the electorate and legitimacy in the eyes of the international community. A power-sharing agreement, the Global Political Agreement (GPA), was signed by all parties plus SADC, underwritten by the AU and given constitutional effect by parliament (all parties called a whip vote).

The main weakness of the agreement was that it was an elite pact; the smaller political parties were excluded from the negotiations. The GPA named the president (Mugabe) and prime minister (Tsvangirai). However, while it looked like a negotiation of equals, it was not: ZANU-PF stayed in a position of power. The power-sharing arrangement did not extend to the bureaucracy, which stayed under the control of ZANU-PF. The reasons for the limitation to the GPA included the MDC's lack of experience; the SADC pressured the MDC to sign to bring peace before anything else. The MDC also questioned the neutrality of the SADC representative in the negotiations, South African President Thabo Mbeki.

The GPA set out the terms of the constitution-making process, which included provisions for the process to be inclusive and democratic, and listed that public hearings and consultations must be held and overseen by the Select Committee of Parliament made up of the political parties. The committee was co-chaired by the three main parties represented in the power-sharing arrangement. The constitution-making process included three phases: preparatory, outreach and drafting. Civil society, political parties and the international community were involved in the first phase. The second phase also included civil society alongside the political parties and external experts. Due to their involvement in the first two phases, civil society wanted to be involved in the drafting and negotiation phase. However, drafting was limited to the political parties.

The first draft of the constitution was released on 17 July 2012. This was followed by an All-Stakeholders Conference in October 2012 to review the draft and make recommendations. ZANU-PF rejected several provisions of the draft, and submitted a list of 30 recommendations, which included restoring powers to the executive that had been reduced in the draft. Many of these recommendations were incorporated into the final draft constitution of 31 January 2013. This was accepted by referendum on 13 March 2013, with 95 per cent in favour, and promulgated on 22 May 2013.

Box 5: Kenya case study

In 1964 the government amended the 1963 post-colonial constitution to constrict the democratic basis of the state. In 1992, there was a return to plural democracy, but change did not go much beyond having a plurality of political parties.

The system became more open in 1997, when the government passed the Constitution of Kenya Review Act to allow for constitutional review after the elections. This act was amended in 1998 to make participation a key aspect of the process, in response to informal national conferences that advocated for a more inclusive process. Yash Ghai, the chair of the newly established Constitution of Kenya Review Commission, led a process that sought to create dialogue among and between the government, political elites and the general public. A draft constitution was published in September 2002, but the president called for elections.

The opposition parties formed a coalition party for the December 2002 election, which allowed them to oust the incumbent independence party. However, the coalition immediately fell apart. This affected the constitution-making process, which ended with a failed referendum in November 2005.

Following post-election violence in 2007, the African Union brokered a power-sharing agreement to establish a Government of National Unity. A new constitution was drafted as part of the agreement. A committee of experts was established as a technical mechanism to oversee the constitutional process. It was made up of eight members, four from each side, who were outside the political class because politicians were treated with suspicion. This constitution was passed in a referendum in 2010.

The push for constitutional reform came from the people, who demanded an inclusive process in protest against their exclusion. Although the process that resulted in the 2010 constitution was tied to the post-election violence settlement, the push for constitutional change began in the late 1990s, following the return to multiparty democracy in 1992. While constitutional reform could have been handled by parliament, direct participation in the process was needed and demanded. Public participation helped determine the content, and has continued throughout the implementation stage.

Workshop participants also examined whether an inclusive process necessarily makes the final outcome—the constitution—more successful or legitimate. For example, there was concern about what happens to a commitment to public participation when the public wants to include something that contradicts international norms or liberal standards, as was the case in South Africa, where the majority wanted to include the death penalty in the constitution. The workshop participants' response to this reservation was that the legitimacy of the constitution does not come from the number of people involved but from the overall process, as well as the wider relationship of the constitution to international legal standards.

In many cases, the constitution is often agreed after a peace agreement and towards the end of the political settlement process, when many of the power dynamics and structures are determined. In the initial stages of the political settlement process, power and influence are determined by the relative military strength of the parties involved. Thus there is little space for women, non-armed groups and moderates to be

included in the process, at least at the peacemaking stage. Afterwards the space opens up somewhat, but even if the constitution-building process is a participatory process, discussions on process and design are already circumscribed by previous bargaining at the peace table. Additional issues raised were whether the same individuals or groups at the peace table should be included in the constitution-building phase of the settlement, and whether increasing the number of participants in the constitution-building process can destabilize earlier 'elite pacts'. These questions were raised in the context of Somalia, where ongoing conflict with Al-Shabaab threatens to derail the political settlement process (see Box 6).

Box 6: Somalia case study (continued)

A further complication to the constitution-making process in Somalia, which has been ongoing since 2004, is the conflict with Al-Shabaab. Even as the constitution drafting is drawing to an end, the Somali Parliament and Government have little control of the country beyond a small area in Mogadishu. Since 2011, the Somali Government has offered overtures to Al-Shabaab, though it refuses to lay down its arms.

The civil war started because the clans, in the absence of good government and protection, became dominant and took up arms. To bring trust and cohesion to Somalia, efforts need to be made to bring peace to the communities. However, insufficient attention has been paid to negotiating peace among the communities, in part because much of the money and resources provided by the international community have been directed towards the war on terror, given Al-Shabaab's links to al-Qaeda, rather than peacebuilding.

This lack of peace has also affected public participation and therefore the legitimacy of the constitutional process. The Federal Constitution Commission spent its first years focusing on capacity building. However by 2010, public outreach for the constitutional process was not organized due to the poor security situation in Somalia, and related logistical and technical problems. The lack of public participation throughout the process increased the perception that the constitution was being produced outside the country. In order to correct this perception, outreach was conducted as much as possible given the security situation. Somalia is an oral society, so public radio was used extensively as well as television in urban areas.

The 825-member National Constituent Assembly, which included 30 per cent women, passed the 2012 Provisional Constitution with 96 per cent in favour. The security situation made it virtually impossible to hold a referendum.

The international community's role in the political settlement

The final theme that emerged in the workshop was the role of the international community in the political settlement process. While participants disagreed whether the 'international community' consists of the United Nations, a larger body of (donor) states, (international) civil society, or the international experts that give advice and/or technical assistance in these processes, they agreed that it holds a normative position, with the capacity to play either a negative or positive role. While the international community can provide the space to bring people together, it often is unaccountable for its own failures on the ground. Even as it pushes international norms on accountability

and transparency as the key to transitions, the international community is itself not accountable or transparent. Furthermore, the personnel who represent the international community in local processes are constantly changing, meaning that there is no real sensitivity to the day-to-day dynamics of the process.

The UN, which is often at the forefront of international engagement in post-conflict processes, often holds the difficult role of organizing the international community in large-scale conflicts, requiring it to coordinate many different agendas and stakeholders. However, this is an almost impossible compromise to manage. The UN is often blamed for any failure or return to conflict, but the workshop participants noted that stakeholders must also accept some responsibility.

In political settlements, the international community and experts need to engage more with local politics and people. While participants acknowledged that this is difficult advice for the international community to follow, as there are no clear guidelines for increasing local engagement. International organizations may also lack the capacity for meaningful local engagement. The international community may also push constitution-making because it is expected as part of the formal political settlement process. This may motivate local actors to pursue constitutional processes in order to access aid controlled by the international community.

While the international community claims that it does not engage in cookie-cutter approaches to constitution-building, it often lacks the capacity (or sometimes even the willingness) to be more serious about understanding contextual specificities. At the same time, local players have a duty to assert themselves and to voice their agendas to their international counterparts.

The workshop participants identified four elements that are crucial to the success or failure of international engagement in the mediation of political settlements, including constitutional negotiations:

1. *Leadership*. The need for leadership is essential. In rare instances, international actors will be forced to provide leadership, but in most cases their role should be focused on stressing the importance to national leaders of reaching sufficient consensus.
2. *Pragmatism*. Principles such as early calls for elections or demands for constitutional referendums may be unhelpful in some contexts. More pragmatic solutions, such as executive power sharing, are sometimes the best way out of a crisis.
3. *Engagement*. Some participants asserted that international mediators should engage with all parties to a conflict. If nothing else, doing so provides insight into the complete spectrum of views. Some actors, particularly those heading non-state armed groups, may be very isolated, and sometimes foreigners are the only ones who can give an independent reading on (or even an impartial perspective of) the status quo, and thereby help them in their decision-making.
4. *Patience*. The international donor community is impatient for results, and its mechanisms—from short-term funding cycles to regular turnover of personnel—work against the long-term, gradual nature of political settlements.

4. Conclusion and recommendations

This workshop brought together academics and practitioners to consider the political settlement process in order to provide insights into the challenges discussed above. The workshop discussions and recommendations summarized in this report will form the basis of a Policy Paper that will include guidance and recommendations on the negotiation of peace agreements and constitutions as interconnected parts of political settlements and address the timing, sequencing, inclusion and role of the international community in the political settlement process. The paper will build on the preliminary recommendations below, which summarize the general output of the discussions and do not imply consensus on these issues.

1. *A political settlement process is necessary to end conflict, and can create space for political discussions*. The political settlement process creates political space that is necessary for transition. The international community may be able to provide this space to help actors bargain and find compromise. However, the international community has largely failed to understand the complexity of formal and informal political processes at the local level. The language and concept of the political settlement was developed to address this shortcoming, and has gone some way towards articulating this failure.
2. *There needs to be a balance between allowing time to build consensus and using deadlines to keep the process on track*. If conflict is not adequately addressed through the peacemaking or constitution-building process during the same time period, the conflict can shift or re-emerge. The worst-case scenario is one in which the constitution-building process is trying to respond to out-of-date circumstances. Flexibility might be needed to place the constitution-building process on hold until a modicum of peace has been reached. At the same time, while a consensus has been emerging that timelines can be a useful tool, they only work where stability can be maintained and the circumstances do not radically change. In Kenya timelines worked, but in Somalia and Libya they did not.
3. *Popular buy-in is important for future implementation*. The constitution includes mechanisms for holding political elites accountable, which strengthens the case to include the public in the process. In the absence of enlightened elites, the role of the broader public is paramount in making sure institutions and processes are established that will hold elites accountable, and in continued enforcement of those accountability mechanisms. However, there is debate over when the public should be brought into the process.
4. *There is tension in the political settlement process between balancing broad participation and closed elite bargaining*. While public involvement is important to help the people feel that the constitution addresses their concerns, broad participation can also destabilize political compromises.

5. *Local and international actors need to work together and increase their mutual understanding*. International actors often do not pay sufficient attention to local dynamics, yet it is increasingly clear that contextual issues can have a significant impact on the implementation of programmes or specific activities.
6. *The nature of conflict is changing*. In many of the case studies considered in this workshop, violence (or the threat of violence) was present and/or changing throughout the constitution-making process. In some places, terrorist organizations were or started operating, making it more difficult to find a peaceful political settlement. There was tentative agreement among workshop participants that the process should engage with all actors, and that talking to such organizations does not equate to giving into their demands.

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Annex 1. Workshop agenda

DAY ONE: 3 December 2015		
Time	**Location**	**Session**
11:00 – 12:00	Carstares Room, Old College	Registration and brunch buffet
12:00 – 12:30	Raeburn Room, Old College	Welcome
12:30 – 14:00	Raeburn Room, Old College	**Session I: Introduction to the conceptual framework of 'political settlements'** *This foundational session will establish the conceptual framework defining political settlements, drawing from on-going PSRP work and the gap this workshop seeks to fill. Furthermore, this session will interrogate the dynamics in constitutional negotiations, and the concepts of inclusion, participation and representation, as they relate to the 'political settlement' process.*
		Moderator: Kimana Zulueta-Fülscher Leading questions: • **Christine Bell**, on 'What does the concept "political settlement" mean: multitude of events or a multidimensional process? Elite bargains or elite–constituency relations?' • **Tom Ginsburg**, on 'Overview of forces, mechanisms and actors in post-conflict constitution negotiations' • **Christie Warren**, on 'What forms of public participation/representation exist throughout the process and how do these differ?'
14:00 – 14:15		Break

14:15 – 15:45	Raeburn Room, Old College	**Session II: 'Constitutional' peace agreement vs. 'peace agreement' constitutions: implications for inclusiveness** *This session will capture the differences between peace agreements that include constitutional provisions, and constitutions that serve as peace agreements, in terms of their production and relative inclusiveness.*
		Moderator: Christine Bell Leading questions: • How do 'constitutional' peace agreements differ from 'peace agreement' constitutions and other constitutions? Do they differ in terms of inclusion of elites or the broader society? Do they imply different forms of trade-offs between elite power brokering and inclusion? • When and how are constitutions (or constitutional provisions) produced within peace agreements, or after peace agreements, that is, as interim or permanent constitutions? What difference does it make to (a) the stability of the elite deal; (b) the broader inclusiveness of the process? • To what extent does having one or the other have an impact on drafting the permanent constitution? **Experts on call:** • **Abdurahman Hosh Jibril** (Somalia) • **Mohammed Elghanan** (Libya) • **Paul Williams** (Yemen)
17:00 – 19:30	Lower Ground Floor, David Hume Tower	**Reception and film screening** *Screening of the film Democrats, a documentary on the Zimbabwe constitution-building process leading to the 2013 constitution, including a Q/A with the director and protagonists.*
19:30 onwards		Conference dinner

DAY TWO: 4 December 2015		
09.00 – 11:00	Centre on Constitutional Change Seminar Room, St John's Land	**Session III: Elite pacts and participatory constitution-making I: guarantees for the elite pact** *This session will explore the importance of having elite bargains, and the extent to which they may limit public participation, especially regarding constitution-building processes. It will also deal with the relationship between elites and their constituents, in terms of representing them or including their inputs in the constitutional process.*
		Moderator: Asanga Welikala Leading questions: • How do 'peace agreement' constitutions or 'constitutional' peace agreements put in place guarantees for the elite deal to be implemented during the political settlement process, or for the elite deal to remain in the final constitution? (for example, principles or other procedural mechanisms such as vetoes) • How does constitutional design aim to accommodate and reflect underlying processes or bargains? • How do constitutions guarantee the elite pact beyond promulgation (for example, binomial electoral system in Chile, immunity from prosecution, eternity clauses)? **Experts on call:** • **Shirwa Jama** (Somalia) • **Hassen Ebrahim** (Various) • **Douglas Mwonzora** (Zimbabwe)
11:00 – 11:15		Break

11:15 – 13:00	Centre on Constitutional Centre on Constitutional Change Seminar Room, St John's Land	**Session IV: Elite pacts and participatory constitution-making II: the effect of broad participation on the elite pact, and constraints on public participation via the elite pact** *This session will examine guarantees for implementation that elites might put in place while designing transitional arrangements (that is, the ´peace agreement´ constitution or the ´constitutional´ peace agreement), and the extent to which these guarantees might hamper flexibility in the constitutional negotiation process.*
		Moderator: Andy Carl Leading questions: • To what extent does there need to be a 'bargain' between elites in place in order for a constitution-making process to be successful? • To what extent do elite bargains limit or enable other forms of participation: how open is that bargain to other normative claims from, for example, women or minority groups? How does the process of peace and constitution-building, insofar as it relates to public participation, make it easier, or more difficult, for elites to reach a compromise? • What is the degree of authority and representativeness of elites at the negotiating table, and how does this affect their ability to commit constituents throughout the process? • How does one account for spoilers who cannot be brought inside the constitutional project? **Experts on call:** • **Jan Schmidt** (Somalia) • **Hassen Ebrahim** (Various) • **Douglas Mwonzora** (Zimbabwe) • **Martha Karua** (Kenya)
13:00 – 13:45		Buffet lunch

13:45 – 15:15	Centre on Constitutional Change Seminar Room, St John's Land	**Session V: What role for the international community throughout the political settlement process** *This session will discuss the role of the international community, in its various guises, and how that role can affect inclusion throughout the political settlement process.*
		Moderator: Jason Gluck Leading questions: • Who is the international community? What are the diverse roles and interests? At what point in the process does it have a clear role to play? • What role does the international community play in forging the ground for elite cooperation? What is its role in selecting/recognizing elites as negotiating parties in countries without formal governance structures? • What types of strategies have proven effective in opening up the political settlement process to a range of other actors, and have these efforts stabilized or de-stabilized political settlements in the long term? **Experts on call:** • **Jan Schmidt** (Somalia) • **Benedetta Oddo** (Libya) • **Mohammed Elghanan** (Libya) • **Erik Solheim** (Various)
15:15 – 15:30		Break
15:30 – 17:00	Centre on Constitutional Change Seminar Room, St John's Land	**Session VI: Conclusion and next steps** *The final session will focus on what policy recommendations might emerge from the discussions.*
		Moderator: Sumit Bisarya **Panellists: Christine Bell, Tom Ginsburg, Christie Warren**

Annex 2. List of participants

1. Rachel Anderson, DFID Peace Agreement Research Analyst, Edinburgh Law School
2. Christine Bell, Professor of Constitutional Law, Edinburgh Law School
3. Sumit Bisarya, Head of Mission and Senior Programme Manager, Constitution-Building Programme, International IDEA
4. Markus Böckenförde, Executive Director and Senior Researcher, Centre for Global Cooperation Research, Duisburg University
5. Peter Bowling, GreenNet
6. Andy Carl, Executive Director, Conciliation Resources
7. Cindy Daase, Associated Fellow, Zukunftskolleg, University of Konstanz
8. Hassen Ebrahim, Member, Mediation Support Standby Team, Mediation Support Unit, UN Department of Political Affairs
9. Mohammed Elghanam, Seconded Appellate Judge from the Egyptian judiciary to the UN and Constitutional Advisor, United Nations Support Mission in Libya (UNSMIL)
10. Rob Forster, PSRP Research Analyst, Edinburgh Law School
11. Tom Ginsburg, Leo Spitz Professor of International Law, Chicago University
12. Jason Gluck, Senior Program Officer, Constitution Making and Inclusive Politics, United States Institute of Peace
13. Shirwa Jama, Legal and Governance Advisor, IDLO, Somalia
14. Astrid Jamar, DFID Research Assistant, Edinburgh Law School
15. Abdurahman Hosh Jibril, Lawyer and former Minister of Constitutional Affairs and Reconciliation, Somalia
16. Dimitrios Kagiaros, Teaching Fellow, Public Law and Human Rights Law, Edinburgh Law School
17. Martha Karua, Kenyan politician, former long-standing Member of Parliament for Gichugu Constituency and an Advocate of the High Court of Kenya
18. Douglas Mwonzora, Zimbabwe Secretary General, Movement for Democratic Change
19. Camilla Nielson, Screenwriter, Director
20. Benedetta Oddo, Partnership Building Senior Advisor, Euro-Mediterranean Region, Parmenides Foundation

21. Jan Pospisil, Postdoctoral Research Fellow, Political Settlement Research Programme, Global Justice Academy
22. Jenna Sapiano, PhD candidate, School of International Relations, University of St Andrews
23. Jan Schmidt, Research Fellow and Somalia Country Manager, Max Planck Foundation for International Peace and the Rule of Law
24. Rebecca Smyth, Student, Edinburgh Napier University
25. Erik Solheim, Chair, OECD Development Assistance Committee
26. Silvia Suteu, Doctoral Candidate, University of Edinburgh and Associate Director for Research Engagement, Edinburgh Centre for Constitutional Law
27. Stephen Tierney, Professor of Constitutional Theory and Director, Edinburgh Centre for Constitutional Law
28. Chris Thornton, Project Manager for Middle East and North Africa Regional Office, Humanitarian Dialogue Centre
29. Christie Warren, Professor of the Practice of International and Comparative Law and Director, Comparative Legal Studies and Post-Conflict Peacebuilding Program, William and Mary Law School
30. Asanga Welikala, ESRC Teaching Fellow in Public Law, University of Edinburgh School of Law, and Associate Director, Edinburgh Centre for Constitutional Law
31. Paul Williams, President, Public International Law and Policy Group
32. Laura Wise, Research Analyst, Edinburgh Law School
33. Kimana Zulueta-Fülscher, Senior Programme Officer in Conflict, Security and Constitution Building, International IDEA

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the fields of elections, constitution-building, political parties, gender in democracy and women's political empowerment, democracy self-assessments, and democracy and development, we undertake our work in three activity areas:

1. providing comparative knowledge derived from practical experience on democracy building processes from diverse contexts around the world;
2. assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
3. influencing democracy building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, it has offices in Africa, the Asia-Pacific, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations.

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